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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 JAMES WESTBROOK,

11 Plaintiff,

12 v.

13 GES EXPOSITION SERVICES, INC., *et*
14 *al.*,

15 Defendants.

Case No. 2:05-CV-00532-KJD-GWF

ORDER

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17 Presently before the Court is Defendants' Request for Entry of Summary Judgment
18 (#123/126). Plaintiff filed a response in opposition (#127) to which Defendants replied (#129).
19 Plaintiff also filed a Sur-reply (#130/131) which he titled Errata – Documents in Support of
20 Plaintiff's Response. Also before the Court is Plaintiff's Motion for Reconsideration (#133).
21 Defendants filed a response in opposition (#135) to which Plaintiff replied (#138). Finally before the
22 Court is Plaintiff's Renewed Objections to the Bill of Costs (#136). Defendants filed a response
23 (#137) to the objections.

24 **I. Background**

25 Defendants filed motions for summary judgment (#107/109) on August 28, 2006. Plaintiff's
26 response was due September 15, 2006. Plaintiff and Defendants stipulated to an extension of the

1 response time making Plaintiff's response due October 15, 2006. On October 18, 2006, Plaintiff
2 filed a motion to again extend the time to respond to the motions for summary judgment an
3 additional thirty days. On November 7, 2006, after allowing time for Defendants to respond, the
4 Court granted Plaintiff's request for an extension of time requiring his opposition to be filed no later
5 than November 15, 2006. On November 15, 2006, Plaintiff requested yet an additional extension of
6 five days to respond to which Defendants objected. On November 27, 2006, the Court granted
7 Plaintiff's extension over the objections of Defendants. However, Plaintiff failed to file his
8 opposition despite the Court's ruling.

9 Realizing that Plaintiff was appearing *pro se*, the Court did not immediately consider the
10 motions for summary judgment. The Court allowed three days for mailing of its November 27, 2006
11 order. Furthermore, even though Local Rule 7-2(d) allows the court to consider failure to file points
12 and authorities in opposition to a motion consent to the granting of the motion, when ruling on a
13 motion for summary judgment, the Court was required to consider the merits of the case by
14 considering all evidence available to it, including Plaintiff's verified complaint, and could not grant
15 summary judgment unless Defendants showed that there was no genuine issue as to any material fact
16 that entitled them to judgment as a matter of law. See Marshall v. Gates, 44 F.3d 722, 725 (9th Cir.
17 1995); Martinez v. Stanford, 323 F.3d 1178, 1182-83 (9th Cir. 2003)(citing Henry v. Gill Inds., Inc.,
18 989 F.2d 943, 949-50 (9th Cir. 1993)).

19 While the Court considered the evidence before it and awaited even a late response from
20 Plaintiff, on December 6, 2006, Defendants filed a Request for Entry of Summary Judgment
21 (#123/#126) (hereinafter "the Request") based upon Plaintiff's failure to file an opposition to their
22 motions for summary judgment. Finally, on December 18, 2006, having received no response from
23 Plaintiff, the Court ruled upon the pending motions for summary judgment and granted summary
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1 judgment to Defendants.¹ See Order (Docket #124). The Clerk of the Court then entered Judgment
2 (#125) by a separate document.

3 Plaintiff filed his response in opposition (# 127) to the Request on December 26, 2006.
4 Defendants replied (#129) on January 8, 2007. The next day Plaintiff filed a Sur-reply (#130) which
5 he titled Errata-Documents in Support of Plaintiff's Response to Entry of Summary
6 Judgment/Request for Reconsideration (127) Affidavit of James Westbrook; Petersen Affidavit;
7 Duffy Affidavit both containing numerous issues of material fact supporting Request for
8 Reconsideration. The sur-reply contained affidavits dated November 15, 2006 from two potential
9 witnesses, and his own affidavit dated January 9, 2007. Plaintiff also filed an *ex parte In Camera*
10 submission (#131) under seal which contained more points and authorities in support of his
11 opposition to Defendants' Request and a letter from his doctor explaining his medical condition.

12 II. Analysis

13 A. Defendant's Request for Entry of Summary Judgment

14 The request for entry of summary judgment must be denied for two reasons. First, the
15 Request was docketed as both a reply in support of Defendants' motion for summary judgment and a
16 separate motion for summary judgment. The Request is clearly not intended as a separate motion,
17 but as support for its pending motion for summary judgment. Defendants intended the Request as a
18 reminder to the Court that the time for a response had passed. Dispositive motions were due no later
19 than August 28, 2006. See Order (Docket #75)(setting August 28, 2006 as the last date to file
20 dispositive motions). If the Request was intended as a separate motion it was clearly untimely filed
21 and should have been stricken for that reason alone.

22 Second, the Request was made moot by the Court's Order (#124) granting Defendants'
23 motions for summary judgment. It was not necessary to allow Plaintiff to respond, because a
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25 ¹Though considering Local Rule 7-2(d) and Plaintiff's lack of opposition in its Order, the
26 Court evaluated each claim separately upon the merits and evidence presented. This fact was ignored
in Plaintiff's opposition and motion for reconsideration.

1 response to a moot motion would have been futile. However, the parties continued to brief the
2 motion. Plaintiff filed a response on December 26, 2006 which appears to be more of a motion to
3 reconsider than an opposition to the Request.² A day after Defendants filed their reply to his
4 opposition, Plaintiff filed his Errata (#130) ("the Errata") which neither corrects or clarifies his
5 previous filings. Furthermore, it raises evidence and arguments presented for the first time with no
6 opportunity given for Defendants to respond.

7 Local Rule 7-2 (a)-(c), allows a motion, a response and a reply. No provision is made for the
8 filing of a sur-reply. In order to circumvent the Local Rules, notice to Defendants, and to thwart
9 attempts to respond to the issues and evidence raised in Plaintiff's Errata, Plaintiff waited until
10 briefing was completed, before filing the Errata. Sur-replies, such as the Errata, are not sanctioned
11 by either the local rules or the Federal Rules of Civil Procedure. See, e.g., Garrison v. Northeast Ga.
12 Med. Ctr., Inc., 66 F. Supp. 2d 1336, 1340 (N.D. Ga. 1999)(the FRCP do not authorize sur-replies).
13 Therefore, since Plaintiff improperly filed his sur-reply without leave of the Court, the Court will not
14 consider the Errata.³ Furthermore, the Court will deny Defendants' request as moot.

15 Plaintiff additionally filed *ex parte* documents under seal (#131). The Court finds that
16 Plaintiff has not met his burden in submitting the filing under seal. See Local Rule 7-5. Therefore,
17 the Court orders the Clerk of the Court to unseal the documents. Furthermore, to the extent that
18 Plaintiff uses the December 27, 2006 letter of his doctor to justify his late filings, the Court denies
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21 ²In one paragraph, Plaintiff argues that it would have been impossible to comply with the
22 Court's Order (#122) granting the five-day extension of time that Plaintiff sought because it "was
23 granted, filed and expired all on the same day." However, Plaintiff selectively forgets that the effect
24 of the order is extended three days by Federal Rule of Civil Procedure 6(e) which he so aptly cites on
25 page 2, line 11 of his response (#127) in order to demonstrate that his response to the request was not
late. However, despite being given what was effectively an eight-day extension, Plaintiff neither
filed his response to Defendants' motions for summary judgment nor sought an additional extension
of time.

26 ³In fact, the Court would normally order the Clerk of the Court to strike the sur-reply, but
wishes to preserve the record for purposes of appeal.

1 Plaintiff's request for extensions based on this newly presented evidence. Though the doctor opines
2 that "Mr. Westbrook would not be able to commit to any time sensitive assignments at this time," the
3 opinion does not assert that Plaintiff was incapable of responding to the deadline on November 27,
4 2006 after having been granted over ninety (90) days of extensions. The opinion also does not
5 explain how Plaintiff is now able to commit to the time-sensitive filings that he is currently making
6 which require effort that would be no different in responding to Defendants' motions for summary
7 judgment.

8 B. Motion for Reconsideration

9 A motion to reconsider a final appealable order is appropriately brought under either Rule
10 59(e) or Rule 60 (b) of the Federal Rules of Civil Procedure. See United States v. Martin, 226 F.3d
11 1042, 1048 n.8 (9th Cir. 2000). Motions for reconsideration are committed to the discretion of the
12 trial court. See School Dist. No. 1J. Mutlinomah County v. ACandS, Inc., 5 F.3d 1255, 1262 (9th
13 Cir. 1993). A Rule 59(e) motion must be filed no later than ten (10) days following entry of the final
14 judgment. See Fed. R. Civ. P. 59(e). A motion for reconsideration is treated as a Rule 59(e) motion
15 if it is timely filed within the specified ten-day period. See Am. Ironworkers & Erectors Inc. v. N.
16 Am. Constr. Corp., 248 F.3d 892, 899 (9th Cir. 2001). Otherwise, as in the present action, the
17 motion is treated as a Rule 60(b) motion for relief from judgment or order. See id.

18 Pursuant to Rule 60(b), reconsideration is appropriate only upon a showing of: (1) mistake,
19 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) an adverse party's
20 fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) a satisfied, released or
21 discharged judgment; or (6) any other reason justifying relief from the operation of the judgment.
22 See Fed. R. Civ. P. 60(b). A party can obtain relief under Rule 60(b) only upon an adequate showing
23 of exceptional or extraordinary circumstances. See Maraziti v. Thorpe, 52 F.3d 252, 254 (9th Cir.
24 1995).

25 A motion for reconsideration should not merely present arguments previously raised; that is, a
26 motion for reconsideration is not a vehicle permitting the unsuccessful party to reiterate arguments

1 previously presented. See Merozoite v. Thorp, 52 F.3d 252, 255 (9th Cir. 1995); Beentjes v. Placer
2 County Air Pollution Control District, 254 F.Supp.2d 1159, at 1161 (E.D. Cal. 2003); Khan v.
3 Fasano, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001) (“A party cannot have relief under this rule
4 merely because he or she is unhappy with the judgment.”). “As a general rule, the Court does not
5 consider evidence on a motion for reconsideration if the evidence could have been provided before
6 the decision was rendered initially.” Arizona Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927,
7 935 (D. Ariz. 2000) (citing School Dist. No. 1J., 5 F.3d at 1263).

8 Plaintiff asserts essentially three reasons that the Court should reconsider its December 18,
9 2006 Order (#124) granting summary judgment. First, Plaintiff argues that the Court granted
10 summary judgment prematurely by not allowing him to respond to Defendants’ December 6, 2006,
11 Request for Entry of Summary Judgment (#123/126). Second, Plaintiff asserts that his medical
12 condition is excusable neglect for failing to file an opposition to the motion for summary judgment
13 and that his late filed affidavits in addition to his verified complaint create genuine issues of material
14 fact. Third, Plaintiff asserts that the Court’s entry of judgment did not comply with Rules 58 and
15 79(a).

16 Plaintiff’s first argument, that the Court prematurely granted summary judgment by ruling on
17 the pending motions before allowing a response to Defendants’ Request for Entry of Summary
18 Judgment, fails because the Court considered the merits of Plaintiff’s complaints and did not issue
19 summary judgment based solely on his failure to file an opposition to Defendants’ motions.
20 Furthermore, as previously noted, the Request became moot when the Court entered judgment on the
21 underlying motions. Additionally, Plaintiff was aware of a looming deadline and even when the
22 Court granted Plaintiff substantial extensions of time, he still failed to oppose the motions for
23 summary judgment at all. Plaintiff has demonstrated his lack of veracity and his willingness to play
24 fast and loose with the rules of the Court. He cites rules when they benefit him and conveniently
25 ignores them when they do not. He claims to have received his doctor’s letter on December 27,
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1 2006, but fails to file it until, January 9, 2006, one day after Defendants' reply to his opposition
2 denying them a chance to consider and oppose his arguments.

3 Plaintiff's opportunity to oppose the motions for summary judgment was not extended by
4 Defendants' Request for Entry of Summary Judgment. The Court has amply demonstrated that
5 Plaintiff was aware of the deadline or should have been aware of the deadline to file an opposition.
6 Instead, he chose to rest upon the evidence that he had and waited until his case had been dismissed
7 on the merits to begin a flurry of filing activity.⁴ Plaintiff filed nothing but motions for extension of
8 time for ninety days, and then filed seven substantive pleadings between December 26, 2007 and
9 February 21, 2007.

10 As just demonstrated by the Court, Plaintiff's claim that the Court should set aside judgment
11 under Rule 60(b) for excusable neglect fails. "Excusable neglect is an equitable concept that takes
12 account of factors such as prejudice, the length of the delay and impact on judicial proceedings, the
13 reason for the delay, including whether it was within the reasonable control of the movant, and
14 whether the movant acted in good faith." See Franchise Holding II, LLC, v. Huntington Rests.
15 Group, Inc., 375 F.3d 922, 927 (9th Cir. 2004)(internal quotations omitted). In this case, Plaintiff's
16 delay in responding to the motion for summary judgment can only be laid at his feet. While Plaintiff
17 attempts to cite his "medical condition" as the reason he failed to respond to the motion for summary
18 judgment, his doctor's letter merely stated that as of December 27, 2006, almost thirty days after his
19 opposition was due, Plaintiff would have trouble committing to time sensitive activities. The letter
20 does not prove that he was suffering during the approximately ninety days the Court gave him to file
21 a response to the motion for summary judgment. Additionally, the doctor's analysis is belied by the
22 fact that Plaintiff then managed to file seven substantive pleadings in the next sixty days.

23 Furthermore, Plaintiff's good faith is called into question by failing to file his doctor's letter
24 and Errata until after Defendants had filed their reply to his opposition to the Request. The timing of

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26 ⁴For example, he had affidavits from two witnesses dated November 15, 2007, and did not
file them until January 9, 2007.

1 the action, taking into account Defendant's admission that he had the doctor's letter on December
2 27, 2006 and the affidavits on November 15, 2006, suggest that he did not have proper motives in
3 delaying this supplement to his opposition. Finally, Defendants would be prejudiced by granting the
4 motion to reconsider, because Plaintiff alleges that he cannot file an appropriate opposition without
5 additional discovery, a request already denied by the magistrate judge. See Errata, Docket #130,
6 Affidavit of James Westbrook, page 21, paragraph 8; Docket #104 (denying Plaintiff's request for an
7 extension to discovery cut off date). Therefore, the Court will deny Plaintiff's motion for
8 reconsideration because he failed to show excusable neglect.

9 Finally, Plaintiff has asserted that judgment was not entered by separate document
10 chronologically after the Court's order granting summary judgment in violation of Rule 58 and 79
11 (a). Judgment (#125) was clearly entered after the Court's order granting summary judgment (#124).
12 Therefore, this claim is completely meritless. Having cited no grounds for relief, the Court
13 completely denies Plaintiff's motion for reconsideration.

14 C. Plaintiff's Motion to Retax Costs

15 On February 12, 2006, Plaintiff filed a Renewed and Improved Opposition to Bill of Costs
16 (#136). Construing Plaintiff's pleadings liberally, the Court considers the opposition a motion to
17 retax under Local Rule 54-14 and FRCP 54 (d)(1). Having read and considered the motion, and
18 good cause being found, it is denied. Plaintiff merely reiterates the exact arguments made to the
19 Clerk of the Court, including the objections he had already prevailed on. Most of his motion is spent
20 detailing why he should not be liable for attorney's fees. The Clerk of the Court has not taxed
21 attorney's fees nor have Defendants sought an award of attorney's fees. The remaining objections
22 are irrelevant and denied.

23 D. Motion to Extend Time to File Notice of Appeal

24 Plaintiff has moved to extend time to file notice of appeal arguing that his motion for
25 reconsideration has tolled the thirty-day limit set by Federal Rule of Appellate Procedure 4. Plaintiff
26 clearly failed to file his motion within the ten days after judgment has entered. Therefore, Plaintiff

1 must show excusable neglect or good cause. See Fed. R. App. Pr. 4(a)(5)(A)(ii). Plaintiff has failed
2 to show excusable neglect or good cause. See Pioneer Inv. Servs. Co. v. Brunswick Ass. Ltd.
3 P'ship, 507 U.S. 380, 392 (1993)(inadvertence, ignorance of the rules, or mistakes construing rules
4 do not usually constitute excusable neglect). Therefore, his motion to extend time to file notice of
5 appeal is denied.

6 III. Conclusion


7 Accordingly, Defendants' Request for Entry of Summary Judgment (#123/126) is **DENIED**
8 **as moot**;

9 IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (#133) is
10 **DENIED**;

11 IT IS FURTHER ORDERED that Plaintiff's Renewed and Improved Opposition to Bill of
12 Costs (#136) is **DENIED**;

13 IT IS FURTHER ORDERED that Plaintiff's Motion to Extend Time to File Notice of
14 Appeal is **DENIED**.

15 DATED this 27TH day of April 2007.

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Kent J. Dawson
United States District Judge